STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 18, 2003
v	No. 229481 Wayne Circuit Court
JEROME EDWARD BRAY, Defendant-Appellant.	LC No. 97-501027

Before: Smolenski, P.J., and Wilder and Schuette, JJ.

PER CURIAM.

Defendant was convicted by a jury, as charged, of possession of 650 grams or more of cocaine with intent to deliver, MCL 333.7401(2)(a)(i), possession of less than five kilograms of marijuana with intent to deliver, MCL 333.7401(2)(d)(iii), and possession of a firearm by a convicted felon, MCL 750.224. He was sentenced, as a second-felony habitual offender, MCL 769.10, to concurrent prison terms of natural life without the possibility of parole for the cocaine conviction (then mandatory), two to four years for the marijuana conviction, and two to five years for the firearm conviction. We affirm.

I. Facts and Proceedings

Defendant came to the attention of Westland police when they arrested Ned Davis. Davis provided information to police about cocaine dealers in the area, including a dealer named "J," who drove a Camaro. Based on information obtained from Davis, police set up surveillance at an apartment at 515 Tobin Street in Inkster, and identified a Camaro parked in front as belonging to defendant.

During several days of conducting surveillance at the Tobin Street apartment, police noticed that defendant frequently stopped by the apartment for short periods of time, and then left. Police obtained a search warrant for the apartment which they executed on March 3, 1997. That evening, officers saw defendant arrive at the apartment, and shortly thereafter, they saw him leave carrying a small knapsack over his shoulder. Defendant got in to his car and drove away, the officers pursued in their patrol cars until defendant reached a dead end. Defendant left his car, jumped a fence, and ran. After several blocks, police, who were on foot and yelling, "police,

halt," finally apprehended defendant. During his arrest, defendant resisted and a police officer hit him in the head with a gun, leaving a minor cut.

A search of defendant's car revealed a plastic bag containing 139 grams of powder cocaine and a knapsack containing three heat sealed plastic bags. The first heat sealed plastic bag held 14 knotted plastic bags, each containing about 110 grams of crack cocaine; totaling 1,400 grams of crack cocaine. The second heat sealed plastic bag held eight knotted plastic bags containing powdered cocaine; one weighed 123.74 grams and the other seven weighed 873 grams, for a total of about 997 grams. The third heat sealed plastic bag held 978.6 grams of powdered cocaine.

A search of the Tobin Street apartment revealed a nine millimeter handgun in a kitchen cupboard next to three boxes of Ziploc bags and a package of cling wrap. There was also a large box of baking soda and a digital scale as well as two saucepans on top of the stove caked with white residue. Another cupboard contained fourteen knotted plastic bags each holding 26.76 grams of marijuana. Police also found two more handguns and another plastic bag containing marijuana. They found a calculator next to a ledger containing more than twenty names and dollar amounts. The dishwasher was full of items covered in white powder residue that field-tested positive for cocaine. In the bathroom, police found a bag under the sink containing $9,500. In the bedroom, they found another ledger with more than twenty names and amounts of money totaling $52,000.

Following his arrest, police advised defendant of his rights and defendant indicated that he understood them. Defendant gave a statement admitting that he sometimes sold drugs and that he intended to sell the drugs in his car once his boss told him to go ahead. Defendant also gave a written statement admitting that he had done wrong and expressing his hope that his cooperation with the police would help him.

Police officer Scott Murray testified that he thought that he had called both the DEA and the IRS about defendant's case at the request of defendant. But he was certain that he told defendant that any deals concerning pending charges would have to be worked out with the prosecutor's office and that information he provided would have to be corroborated by police. He also told defendant that the DEA was interested in his cooperation but that they wanted him or his attorney to contact them directly.

At trial, defendant's aunt, sister and a friend all testified that defendant was in California during the time that police were observing the Tobin Street apartment. The defense's theory of the case was that defendant was not even in town during the surveillance and that police had defendant confused with his cousin. Defendant's sister testified that she was also his supervisor at work, and she provided documents that showed defendant had requested a vacation during that time. However, another witness, Valerie Sovinski testified that defendant's sister was not a supervisor, nor did she have authority to prepare personnel records, and the records that she provided to the court were not legitimate. Sovinski testified that defendant's personnel file indicated that he had worked on the days in question and that he was a part-time employee who did not accrue any leave time. Subsequently, all three of the witnesses who testified that defendant went to California were charged with perjury.

Defendant was convicted as charged. Following defendant's conviction, he filed a motion for a new trial alleging ineffective assistance of counsel. His claim was based on the fact that his attorneys represented his cousin as well as the informant who led police to defendant. The court denied defendant's motion for a new trial, finding that defendant had failed to demonstrate that, but for counsels' alleged errors, the result of his trial might have been different and that defendant retained his attorneys with full knowledge that there was a potential conflict.

II. Analysis

A. Motion to Suppress Confession

Defendant first argues that the trial court erred in denying his motion to suppress his confession. We disagree.

In reviewing whether there was a valid waiver of the right against self-incrimination and whether a confession was properly admitted, an appellate court conducts a de novo review of the entire record. *People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000). The meaning of the terms "voluntary" and "knowing and intelligent" are questions of law to be reviewed de novo. See *Daoud*, *supra* at 629-630, 633. However, the trial court's findings of fact concerning whether a waiver was voluntary or knowing and intelligent are reviewed for clear error. *Daoud*, *supra* at 629-630, 635.

When a defendant challenges the admissibility of a confession, the prosecution must prove by a preponderance of the evidence that there was a valid waiver of the right against self-incrimination. *Daoud*, *supra* at 634. A valid waiver must be made voluntarily, knowingly and intelligently. *Daoud*, *supra* at 633. This is an inquiry to be determined objectively upon the totality of the circumstances. *Daoud*, *supra* at 633-634, 639.

The first issue on appeal is whether defendant's waiver was voluntary, i.e. whether it was "the product of a free and deliberate choice rather than [police] intimidation, coercion, or deception." *Daoud*, *supra* at 635,[1] 637, 639. Defendant does not claim that the waiver was not knowing and intelligent.

After reviewing the record, we find no evidence that defendant was promised leniency in exchange for his statement. In fact, both officers testified they informed defendant that, if he wanted to negotiate a plea bargain in exchange for information, he would need to contact the prosecutor. One officer testified at trial that he contacted the DEA at defendant's request, but that they also indicated that defendant would need to approach them directly if he wanted to cooperate. There is also no evidence that the officers intimidated defendant concerning his potential sentence. In fact, both officers indicated that defendant already knew that he was facing mandatory life in prison without parole. Additionally, there was no evidence that defendant was denied needed medical care in order to force him to make a statement. In fact, at the hearing of

[1] Quoting *Colorado v Connelly*, 479 US 157, 170; 107 S Ct 515; 93 L Ed 2d 473 (1986), which itself was quoting *Moran v Burbine*, 475 US 412, 421; 106 S Ct 1135; 89 L Ed 2d 410 (1986).

defendant's motion for a new trial, the court examined defendant's mug shot and found that it "did not show the cut on his forehead that he claimed had been bleeding profusely."

We conclude that the trial court did not commit clear error in finding that, as a matter of fact, defendant's statements were the product of free and deliberate choice rather than police coercion. *Daoud*, *supra* at 635, 637, 639. Accordingly, the trial court did not err in concluding that the prosecutor had proven, by a preponderance of the evidence, that defendant's statements were made voluntarily. *Daoud*, *supra* at 634-635.

B. Ineffective Assistance of Counsel

Next, defendant argues that he was denied effective assistance of counsel because: (1) his attorneys were operating under a conflict of interest; (2) they refused to allow defendant to testify; and (3) they failed to investigate the testimony of defendant's sister. We disagree.

The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *LeBlanc*, *supra* at 579. The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *LeBlanc*, *supra* at 579.

A lawyer may not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client, unless the lawyer *reasonably* believes that the representation will not be affected and the client consents after consultation. *Attorney Gen v Public Serv Comm*, 243 Mich App 487, 501; 625 NW2d 16 (2000), quoting Michigan Rule of Professional Conduct ("MRPC") 1.7(b). However, even if there is error concerning the waiver, reversal is not automatic. See *In re Osborne*, 459 Mich 360, 369-370; 589 NW2d 763 (1999). On the other hand, unreasonable conflicts of interest are not waivable. *Evans & Luptak, PLC v Lizza*, 251 Mich App 187, 199; 650 NW2d 364 (2002).

After reviewing the record, we find that defendant's attorneys reasonably believed that their representation of defendant would not be materially affected by their responsibilities to the informant and defendant's cousin. Further, it is clear that defendant was aware of the alleged conflict of interest and that he waived it.

We further note that "[d]ecisions concerning what evidence to present and whether to call or question a witness are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis (On Rehearing)*, 250 Mich App 357, 368; 649 NW2d 94 (2002).[2] To overcome the presumption of sound trial strategy, defendant must show that counsel's alleged error may have made a

[2] The opinion does not indicate that it was issued on rehearing. However, at 250 Mich App 801 (2002), this Court vacated its prior opinion and granted rehearing.

difference in the outcome by, for example, depriving defendant of a substantial defense. See *Flowers*, *supra*, 222 Mich App at 737.

In this case, it is possible that counsel did not call the informant to testify because he would not have testified that he lied to the police. It is also possible that they did not call defendant's cousin to testify because he did not look like defendant as much as others had claimed. More importantly, given the overwhelming evidence against defendant, there is no reasonable possibility that the outcome of his trial would have been different if there had been no conflict of interest and his attorneys had called the informant and defendant's cousin to testify. In particular, even if the informant had testified that he lied to the police concerning whether defendant was selling drugs out of the apartment, his testimony would not have rebutted the fact that defendant was apprehended with over a kilo of cocaine in his car. Similarly, several witnesses testified that defendant and his cousin looked a lot alike and that defendant was in California during the time that the police had the apartment under surveillance. Therefore, the cousin's testimony on that issue would have been cumulative. Additionally, as found by the trial court, there is no reasonable possibility that defendant's cousin would have waived his Fifth Amendment rights and testified that the drugs found in the car were his, not defendant's.

Thus, we find that even if there were error in his waiver of the potential conflict, defendant has failed to show that, but for the alleged errors caused by his attorneys' conflict of interest, the outcome of his trial might have been different.

At the *Ginther*[3] hearing, defendant testified that his attorneys did not allow him to testify because they were angry at the perjury committed by his sister. Assuming that is true, the question is whether defendant's testimony would have made a difference in the outcome of his trial. Defendant testified that he was in California during the last two weeks of February 1997, when the apartment was under surveillance. However, he had no explanation for the schedules, time sheets and other records brought in from his personnel file showing that he had performed duties at work while he claimed to be in California. Defendant claimed that he did not know there were drugs in his car and claimed that they must have belonged to his cousin, who looked like defendant and dented his car while defendant was in California. However, defendant admitted that there was no damage to the car visible in the photographs taken by the police on the night of his arrest.

Defendant claimed that he ran from the police because he did not realize that they were police officers. However, the officers did not run up to the car when defendant was in the apartment complex. Rather, the officers ran up to the car when defendant stopped at a dead end *after* driving away from the apartment complex following a failed attempt to box him in. Defendant testified that he was bleeding profusely from a cut to the head suffered during the arrest. However, when he was shown the mug shot taken that night, he could not see the alleged cut. Lastly, the prosecutor showed that, if defendant had testified at trial, he would have been impeached with evidence of his use of aliases.

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[3] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

In sum, we agree with the trial court that the evidence against defendant was overwhelming and that his testimony "was simply unbelievable." Therefore, even if defendant's attorneys were ineffective in failing to allow him to testify, defendant has failed to show that, but for that error, the outcome of his trial might have been different.

Defendant claims that his attorneys were also ineffective in failing to investigate his sister's testimony. However, defendant's aunt, his other sister, and his friend from California all testified that defendant was in California during the last two weeks of February 1997, when the apartment was under surveillance. All of these witnesses were impeached by evidence that the schedules, time sheets and other records obtained from defendant's personnel file from work indicated that he worked on February 24, 25, and 26, 1997. There was also evidence showing that defendant was a part-time employee and did not accrue any leave time. Further, even if defendant really was in California and the police saw his cousin at the apartment instead of him, that fails to rebut the fact that defendant was arrested on March 3, 1997, with more than a kilo of cocaine in his car. Thus, while his sister's perjury was certainly damaging, defendant has failed to show that, if counsel had investigated further and had refused to allow her to testify, the outcome of his trial might have been different.

C. Prosecutorial Misconduct

Defendant next argues that the prosecutor engaged in misconduct that deprived him of a fair trial when (1) he impeached a witness with a prior drug conviction, (2) he allegedly shifted the burden of proof during closing argument, and (3) he mentioned the search of a different address during his opening statement. Therefore, defendant argues, the trial court erred in denying his two motions for a mistrial. We disagree. Because defendant did not object during closing argument, that issue is not preserved for appellate review.

Unpreserved issues are forfeited unless the defendant can show plain error (i.e., one that is clear and obvious) affecting his or her substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). On the other hand, a trial court's decision to deny a motion for a mistrial is reviewed for abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001), quoting *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

The prosecutor's attempt to impeach defendant's friend with a prior drug conviction was clearly improper. See MRE 609. However, the court gave curative instructions immediately thereafter and also at the end of trial. Jurors are presumed to follow the court's instructions absent clear evidence to the contrary. *People v McAlister*, 203 Mich App 495, 504; 513 NW2d 431 (1994). There is no such evidence in this case. Further, given the overwhelming evidence against defendant, we cannot conclude that this error deprived defendant of a fair trial.

Concerning the prosecutor's closing argument, the record reveals that the prosecutor explicitly told the jury that defendant did not have the burden of proving anything. The prosecutor noted that defendant's girlfriend was never asked about defendant's alleged trip to

California and theorized that defendant was afraid that she would tell the truth, i.e., that there was no such trip. This was permissible commentary on the evidence and did not tend to shift the burden of proof. Thus, there was no misconduct and no plain error. Further, even if there were error, given the overwhelming evidence, there is no reasonable possibility that it affected the outcome. Therefore, this issue has been forfeited.

Concerning the prosecutor's opening statement, the comment concerning the other search, although improper, was brief and was tempered immediately with a curative instruction. Additionally, the court had already instructed the jury that lawyers' comments are not evidence and repeated that instruction at the end of trial. The jury is presumed to have heeded the court's curative instructions. *McAlister*, *supra* at 504. We conclude that this error did not deprive defendant of a fair trial.

D. Ineffective Assistance of Counsel Claim

Lastly, defendant argues that his attorneys were ineffective in failing to move for a mistrial when the prosecutor asked two police officers whether they had met defendant in 1991. We again disagree. This issue was not addressed at defendant's *Ginther* hearing; thus, review is limited to mistakes that are apparent on the record. See *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

When the prosecutor asked about any prior contacts the officers had with defendant, the trial court raised the other acts issue sua sponte and made sure that the jury was not informed about the nature of the contact. The mere fact that the officers had met defendant in 1991 was not other acts evidence. Therefore, pretrial notice under MRE 404(b)(2) was not required, an evidentiary objection would have been futile, and counsel was not ineffective in failing to make it. See *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

Further, the prosecutor was clearly addressing defendant's theory that, during the surveillance of the Tobin Street apartment, the officers had seen defendant's cousin, not defendant, but had mistaken him for defendant because they looked alike. Even in the context of prosecutorial misconduct, "an otherwise improper remark may not rise to error requiring reversal when the prosecutor is responding to the defense counsel's argument." *People v Watson*, 245 Mich App 572, 593; 629 NW2d 411 (2001), quoting *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Thus, to the extent that notice was necessary, it was excused. See MRE 404(b)(2).

Additionally, whether and how to impeach witnesses is a matter of trial strategy entrusted to counsel's professional judgment. *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997). In order to overcome the presumption of sound trial strategy, defendant must show that counsel's alleged impeachment error may have made a difference in the outcome. See *Flowers*, *supra* at 737; see also *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

Given the overwhelming evidence against defendant, the challenged evidence about the officers' prior contact with defendant not deprive him of a fair trial and, therefore, did not justify declaring a mistrial. There is no reasonable possibility that, but for counsel's failure to object

and move for a mistrial, the outcome of defendant's trial would have been different. Accordingly, defendant has failed to carry the heavy burden of overcoming the presumption of sound trial strategy. *Pickens*, *supra* at 312, 314.

Affirmed.

/s/ Michael R. Smolenski
/s/ Kurtis T. Wilder
/s/ Bill Schuette